Progress report on Amount A of Pillar One. Two-pillar solution to the tax challenges of the digitalisation of the economy. *Public consultation*[1] *document 11 July – 19 August 2022.*

Mr. Secretary-General,
Madam, Sir,

The request for public input on the Progress Report marks a long way since 2019 when the Secretariat submitted a 'Unified Approach' for public input. Innovative and even quite revolutionary choices that presented by the Progress Report are:

- reporting profit & tax relief at a group level instead of individual companies,
- using as a tax base reported group profits that are modified on 10 issues that form Alternative Performance Measures (APM[2]) and have as common denominator to strive towards an increased amount of operational profits by yielding a higher net income out of the gross revenues then reported,
- allowing carried forward deduction of losses that still result after applying these APM'S on the report group loss,
- splitting that altered reported profit on the level of the group, in 10 % profit that is not to be distributed to the market jurisdictions (the participant presumes that this a correction for the increased operational profit) and the eligible altered profit to be distributed among market jurisdictions,
- fixing a unique margin of 25 % for all digital business models alike, as the part of the eligible altered profit that can be distributed among the market jurisdictions, leaving the other 75 % out of scope,
- allocating revenue to market jurisdictions per type of digital business model in scope,
- singling out and allocating a presumed share of revenue obtained through harvesting user data,
- distribute the 25 % of the eligible altered profit among market jurisdictions by the allocation of revenue that must exceed a minimum threshold in that jurisdiction,
- deduct from the taxes the market jurisdiction can claim from the group a Marketing and Distribution Profits Safe Harbour Adjustment that seeks to preserve routine profits linked to production factors, what seems for the parcipant to be some sort of amount 'B' as originally presented under the Unified Approach,
- what jurisdiction should give tax relief to the group for the taxes that go to the market jurisdiction.

The whole forms a new set of rules that organises a parallel taxation regime that has the ambition to stand next to the existing networks of tax treaties (OECD, US, UN) through a multilateral convention that is yet to be presented.

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[2] APMs tend to exclude some income or expense items to convey other views of profit or loss. Common terms used to identify such measures include 'EBIT, 'EBITDA' and 'operating income'.

1. The **first topic** the participant wishes to provide input on is motivated by his concern for fairness by the choices in the Progress Report for on the one hand one margin of 25 % that fits all digital business-models alike to determine the amount 'A' and on the other hand the correction on the amount of taxes due to a market jurisdiction, that serves a similar purpose as amount 'B' under the Unified Approach.

Is it fair that in the Progress Report no minimum amount 'A' is always due to the market jurisdiction? Is there a real need for reducing the amount 'A' by considering production factors outside the market jurisdiction? Could one not simply agree to lower the 25 % margin when a type of digital business-model is known to rely more heavily on production factors outside the market jurisdiction to create wealth?

2. The **second topic** relates to the mandatory choice of the Jurisdiction that must give tax relief to the group. Why must jurisdictions with assets give tax relief if they did not collect and tax the gross revenues as well? A triangular approach is preferable in the participant's view : the 'market' jurisdiction, the jurisdiction that holds the server (depreciation) and personnel (payroll) (the 'workshop') but also, in some cases, the jurisdiction of the company that collects and taxes the revenue from that digital activity from the group's clients (the 'counter') when not present in these two other jurisdictions (market or workshop). Collected revenue may then only go in part to the workshop jurisdiction (for example : cost+) and the surplus may be sent to another jurisdiction.

In presence of groups that chose to organise a 'counter' company (with little substance or a mere conduit company) on a regional or global level, should fairness then not require that the obligation to give tax relief goes first to the 'counter' jurisdictions that collected the gross revenue? Only to the extend the taxes levied there do not suffice to grant full credit to the group, tax relief is passed on to the workshop jurisdictions as presented in the Progress Report.

Finally, must there be a full tax relief provided all together for taxed revenue in another jurisdiction when not subjected to a minimal effective taxation? Could tax relief not be made subject in the MLC to anti-avoidance and other measures that seek to mitigate the effects of tax planning?

3. Even though the MLC is not a part of the Progress Report that was presented for public input, the **third and last topic** of the participant relates on how the Un Tax Committee has organized a different approach under Article 12 B 2021 UN MTC. These differences are commented by the participant under the first topic with suggestions to adapt both approaches.

It is unlikely for the participant that an 'international tax court' can be organised under the MLC. The International Court of Justice shall then address the litigations concerning MLC provisions regarding third countries and the model conventions by applying the rules as laid out in its Statutes. The UN interpretation rules of treaties are therefor to be taken in account.

Some adjustments to both the Progress Report and the 2021 UN MTC approaches are proposed by the participant to provide a common ground in future tax litigation before the ICJ under both approaches and the existing tax treaty networks. This through the Customary International Law on rules of Interpretation of Treaties.

Topic 1 : *A 25 % margin to fit all digital business models for determining amount 'A' ? & Is there a rationale for deducting from amount 'A' an amount 'B' for production factors when using allocated revenue to distribute the tax base for amount 'A'?*

A. The choices for splitting altered reported group profits, use allocated revenue to distribute the split profits among market jurisdictions and determine the amount 'A' by a fixed margin.

4. In his submission of November 2019 to the OECD request for public input on a Unified Approach for Pillar I, the participant gave input in favour of a fractional apportionment approach based on revenue that can be allocated to market jurisdictions. Even though the criteria in that submission to allocate revenue are quite different than those in the Progress report, some rationale that was then provided for that approach remains relevant for commenting the choices made in the Progress report.

The main concern for the participant to favour taxation on the base of revenue was to prevent or mitigate tax planning that may hamper the effectiveness of the Unified Approach. For that same reason the participant considered an approach that uses reported profits to be not effective for yielding a minimum return of taxes to the market jurisdictions. The choice in the Progress Report to alter reported group profits in a way that the obtained net income for the group is less subject to tax planning is a compromise that the participant can support on principle when effectiveness of taxation remains the outcome. But the Progress Report does not organise – or at least not in a clear and certain way – a minimum amount of tax that should always go to the market jurisdictions. This is the main critic the participant wishes to convey out of his concern for effectiveness.

A minimum amount of tax should go to the market jurisdiction even when group losses are reported or carried forward from prior fiscal years. These group losses will be generally provoked by the costs for assets and other production factors located outside the market jurisdiction while the production factor in the market jurisdiction (mostly choices and data of users) will always be profitable by yielding direct or indirect gross revenue. In a digitalized economy the choices of the users determine if a digital business model is fading out or thriving. Even in the event of a group loss a minimum amount of tax should therefor always go to the market jurisdiction. That part of the group loss can be carried forward to the next fiscal year.

5. The United Nations Committee of Experts on International Cooperation in Tax Matters (below the UN Tax Committee) formed a Subcommittee on Tax Challenges Related to the Digitalisation of the Economy (below the Subcommittee) that presented a report on 18 April 2019 to the UN Tax Committee on 'Tax Issues related to the Digitalisation of the Economy'[3].

The analyses made by the Subcommittee on the 'market intangibles' (MI), 'user participation' (UP) and 'Significant economic presence' (SEP) approaches can be summarised, in the participant's view as:

- UP seeks to allocate profit by *splitting profit* that results from *existing rules on profits*.

[3] https://www.un.org/esa/ffd/wp-content/uploads/2019/04/18STM_CRP12-Work-on-taxation-issues-digitalization.pdf

- UP tries to define formulas that approximate the quantity of users in a country and the value of those users.

- MI seeks to modify both nexus rules and profit allocation rules.
- An 'income-split' approach values *marketing intangibles and attendant risks* in a market jurisdiction. The remainder of income is allocated through *existing transfer-pricing rules*. The result is the income that can be allocated to the nexus for taxation by the market jurisdiction.
- A 'profit-split' approach separates 'extra' profit from 'residual' profit by using modified *transfer-pricing rules on cost models and formulas that vary with business models*. In order to split reported profits, the share of income derived from customers in the market jurisdiction is estimated.

- SEP considers dividing profit *allocation* between market jurisdictions and production jurisdictions using a combination of factors pertaining to sales and infrastructure provided by the market and production jurisdictions.
- SEP considers *users* as part of the production process.
- One method consists of setting an income threshold that, once reached, is subject to taxation by 'proxy' criteria in the market jurisdiction such as reported sales. This kind of method would be the simplest for developing countries since they could consider a form of withholding tax on such sales. In the Subcommittee's view this method would entail carrying forward withheld taxes if a loss is reported for the year.
- Another method consists of interpreting Article 7 OECD MTC using accounting methods to allocate profit when books are kept by a permanent establishment or apportionment methods when no such books are kept in the market jurisdiction.

6. The Subcommittee found that UP and MI methods refer in substance to the concept of *value creation*. This is an accounting concept. However, it is deemed that it would be very difficult to find a definition of that concept that meets with a consensus, since every jurisdiction would be inclined to stress those local elements that can be valued most.

The Subcommittee feared that allocating taxing power to market jurisdictions may disadvantage smaller developing countries that are typically supplying and not consuming. This issue goes well beyond the digital economy. Other issues mentioned relate to 'location savings'-- production is less expensive in developing countries and thus allows larger profits for MNEs.

7. The Subcommittee also pointed out that using complex formulas, such as those that refer to existing or modified transfer-pricing methods, require tax administrations with sufficient knowledge and tools to engage in technical discussions with MNEs. Smaller developing countries would have a hard time mustering such tools for effective taxation purposes.

Given all these effects and the high level of uncertainty that a consensus can be reached on definitions of 'value creation', the Subcommittee indicated that, in its view, the Significant Economic Presence approach (SEP) is the most promising for finding a consensus between developing and developed countries on taxing the digital economy.

8. The participant shared the Subcommittee's findings. Since both the other methods entail splitting existing profits using complex definitions based on accounting and asset allocations that require a reset and unification of international accounting standards, these two methods also tend to increase risks for BEPS and exacerbate their effects.

Neither of these two approaches is for the participant effective for taxing wealth created through 'above territories' digital activities. The choice made in the Progress Report to allocate revenue per type of digital activity, including from harvesting user data, is more effective in locating the extend of wealth created trough digital activity in a specific market jurisdiction. The approach in the Progress Report has also no need for resetting and unifying accounting standards when determining an alternative operational profit that can be less modified by tax planning.

However, some more rationale is needed for both the split of the altered reported group profit and the distribution of it among market jurisdiction in function of allocated revenue. The mix or need for production factors in the market jurisdictions varies per type of digital activity. The extend of created wealth in the market jurisdiction that triggers the right to tax, is the result of different mixes of production factors per type of digital activity and so requires differentiation in the part of the excess altered group profit that can be taxed by the market jurisdictions. Setting a single fixed percentage of 25 % for all digital activities alike can be said to disregard the share of wealth creation that can reasonably be attributed to the market jurisdiction per type of digital activity.

The correction the Progress report proposes on the taxes that can go to the market jurisdiction by deducting a Marketing and Distribution Profits Safe Harbour Adjustment where a factor 'Y' is to be determined freely by both jurisdictions is in the participant's view not consistent with the objective of effective taxation by the market jurisdiction, the need to provide to developing countries a minimum tax base they can opt to use for withholding tax purposes and the prior choices in the Progress report to use allocated revenue to distribute the altered profit among market jurisdictions. Indeed, production factors are not revenue. Sales are not collected revenue and can shift between jurisdictions by the way the sale was concluded. Production factors outside the market jurisdiction have been taken in account already by leaving 10 % of the altered group profit out of scope and fixing a maximum percentage of 25 % in the remaining altered profit that can go to the market jurisdictions.

If some members of the exclusive framework that hold production factors are still concerned with a result that already excludes the market jurisdictions of 10 % + 75 % of 90 % = 77,50 % of the altered group profit, they should then rather seek to reduce the single fixed percentage of 25 % in the altered profit further through weighed factors for the production factors located in their territories and the market jurisdictions. Determine different types of digital activity to that end and not seek to further reduce the final amount of tax that is due to the market jurisdiction.

The suggestions of the participant to pass the obligation for tax relief first on to jurisdictions that collect gross revenue before passing it on to workshop jurisdiction and the suggestion to make tax relief itself subject to anti-tax avoidance criterions should mitigate for these jurisdictions their need for a Marketing and Distribution Profits Safe Harbour Adjustment.

9. The participant considers some Subcommittee findings in 2019 for the Significant Economic Presence (SEP) approach to be consistent with choices under the Progress Report:

- dividing profit *allocation* between market jurisdictions and production jurisdictions using a combination of factors provided by the market and production jurisdictions,
- consider *users* as a production factor that can be quantified in allocated revenue,
- an allocated revenue threshold in order to participate in the distribution of the eligible share of group profit among market jurisdictions,
- apportionment methods when books do not allow to allocate collected gross revenue to a market jurisdiction, as for instance for harvesting user data.

In the Subcommittee's view, such an SEP approach then requires a consensus on:

a) the tax base (to allocate income),
b) factors to divide that tax base (users, sales for market jurisdictions, asset and employment for production jurisdictions).
c) weighting these factors to presume the taxable profit.

For developing countries this approach would affect them less since they do not host MNEs that provide worldwide digital services. However, they require simple and manageable criteria for allocating taxing rights in their jurisdiction. Complex criteria allow more accurate allocation of income and profits but in turn could result in more disputes and increased tax uncertainty.

10. Given these considerations, the Subcommittee report suggested that the search for a fair balance between developed and developing countries needs to explore a third approach under the SEP method.

This kind of method should use broad formulas for apportionment that strike a balance between accuracy and simplicity to achieve the goals of tax certainty and manageability. The Unified approach, for which the OECD requested public input in 2019, was motivated by similar considerations (§§ 22 & 52 (stand-alone nexus: fractional apportionment method & no tax loss on physical activity) and § 29 (simple, avoids double taxation, and significantly improves tax certainty).

The choices made by the Progress Report are however complex by applying 10 modifications to the reported group profit and allowing a Marketing and Distribution Profits Safe Harbour Adjustment and may therefore not suitable to be applied in the largest possible number of jurisdictions, especially developing countries with less equipped tax administrations. The participant nevertheless supports the choices under the Progress report for :

- a group profit report,
- allocating the share of profit that goes to market jurisdictions trough the criterion of allocated revenue,
- determining rules of allocation of revenue per type of digital business model that is in scope,
- attribute allocated revenue to users,

- a threshold of allocated revenue that is somewhat adapted to the size of the market jurisdiction.

These concerns over complexity can be addressed in part because there is one single report on the level of the group that is the same for all jurisdictions. For developed countries the altered group profit can be determined by their tax administrations, and they can engage in discussions with the groups in scope on equal terms.

A soon as one tax administration in a developed country has done that calculation and determined the share of altered profit that can go to market jurisdictions for that fiscal year and allocated the revenue to that end, these results can be made available through the Inclusive Framework or the MLC to be used by all market jurisdictions. If a sort of 'reference' clause to an earlier processing of the reported group profit by another jurisdiction was to be inserted as an optional choice for market jurisdictions in the Progress Report, this would to a large extend lift the issue of complexity the Progress Report poses for developing countries.

As for determining a minimum tax income for withholding tax purposes on outgoing payments, developing jurisdictions should be able to opt for a minimum tax rate that they can use to levy withholding taxes on payments originating from their jurisdiction. These payments cannot exceed the amount of allocated revenue to that market jurisdiction under the Progress Report as earlier established by another jurisdiction and reported to the Inclusive Framework members. The group could claim reimbursement or tax credit on future withholding taxes of the withholding taxes that were levied on payments that exceeded the allocated revenue under the formulas presented under the Progress Report.

11. By these two adjustments, the Progress Report could better comply with the requirements of simplicity and tax certainty and other objectives under the Unified Approach ; §§ 27 & 54 (new profit allocation rules: fixed percentages & *variances by industry*) and § 39 (compatible *withholding tax*). These two points will be further commented by the participant.

These same concerns also relate to the choices for one single margin for all types of digital activities alike and for the correction of amount 'A' by an amount 'B' that could lead to zero income for the market jurisdiction in the current version of the Progress Report. There are for example no clear comments on the percentage 'Y' in the formula for Marketing and Distribution Profits Safe Harbour Adjustment.

One type of digital activity creates wealth in a different mix of its production factors of user data, employment, servers, consumption of electricity and use of telecommunications spread among jurisdictions. Some digital activities are more automated than others, some use up more energy than other digital activities. The extend of wealth created in the market jurisdiction cannot be reflected by a single fixed percentage in all altered group profits.

For the participant there is also no rationale for an amount 'B' under the choices to first split profit and use allocating revenue to jurisdictions to determine the amount 'A'. The share the production factors in the workshop jurisdiction represent referrers to accounting standards that measure production costs in the books kept by the group but that does not reflect the share of wealth created in the market jurisdiction to collect gross revenue. Also, the production

factors located in the workshop jurisdictions are already fully deducted before the group reports its worldwide profits. Why should the market jurisdiction suffer then these costs a second time? Only to see its share further reduced in the already split altered profit that can be distributed among market jurisdictions. Should a minimum share not always go to the market jurisdiction when adjusted by the extend of wealth creation that the production factors in the market jurisdiction stand for?

12. As said above, the participant is concerned by the overall effectiveness of Pillar I if no minimum share of the split altered profit can be determined that should always be taxable in the market jurisdiction.

Even when maintaining amount 'B' and the 25 % margin as a general standard, the participant suggests that amount 'A' cannot be reduced by amount 'B' under a minimum percentage, set per type of digital activity that uses a different mix of production factors.

13. For developing countries, efficiency may require collecting income through withholding taxes before the revenue leaves their territory. Withholding taxes are also considered an effective tool against BEPS. The Progress Report shares no view on how withholding taxes.

A withholding tax must have a minimum base of taxes that must be paid. If not, the jurisdiction risks reimbursement. A minimum percentage of allocated revenue per type of digital business model provides such a minimum base better. The Progress Report provides no minimum base when allowing complete compensation of the altered profit with altered losses and the amount 'B' to reduce the amount of tax that is finally due.

14. The update of the 2021 UN MTC on Article 12 A on the taxation of Fees for Technical Services and Article 12 B on the taxation of Automated Digital Services organizes for contracting jurisdictions a low tax rate percentage they can agree to apply on gross revenue that is paid for a segment if an entity or group can provide the required data to that end. The beneficial owner can request that entity or the group be taxed instead on 30 % of qualifying profits under that approach.

The UN Tax Committees Secretary, M. Lennard, states in the Secretariat note[4] that the choice for a gross revenue basis low tax rate allows developing counties to apply a withholding tax at that jurisdiction's choice through source taxation by allocation of taxing rights that is '*based upon the idea that modern methods for the delivery of services allow non-residents to render substantial services for customers in the other country with little of no presence in that country*'.

15. The rationale for the choices under Article 12 B 2021 UN MTC[5] can be summarized as:

[4] Secretariat Note to the 23rd session of the Committee of Experts on International Cooperation in Tax Matters (virtual meetings of 19 to 28 Octobre 2021), Secretariat note, doc E/C.18/2021/CRP.28 https://www.un.org/development/desa/financing/sites/www.un.org.development.desa.financing/files/2021-10/CRP.28%20Digitalized%20and%20Globalized%20Economy%20Final_0.pdf

[5] Editorial Changes to Article 12 B and Commentary. https://www.un.org/development/desa/financing/sites/www.un.org.development.desa.financing/files/2021-09/Article%2012B%20and%20Commentary%20after%2022nd%20Session%20Meetings%2029%20April%202021.pdf

- For selecting gross payments :

16. This choice was made out of concerns for (1) simplicity for both business and tax administrations in applying a system that renders (2) a definite share to the market jurisdictions for preserving domestic taxing rights (3) on payments originating in their territory for (4) automated digital services that are provided there.

A payment meaning the fulfilment of the obligation to put funds at the disposal of the service provider in the manner required by contract or custom for any service provided on the Internet or digital or other electronic network requiring minimal human involvement from the service provider.

When related to the sale over the Internet of goods or other services that require to some extend a human action, the gross payment is not in scope. However, if the payment includes an automated digital service such as (a) selling data collected from a sold connectable device, (b) online advertising displayed on the connectable device or (c) optional paying services that the connectable device can provide, or when a separate payment stream occurs for such motive, the share in the gross payment that relates to these automated digital services is in scope and is to be determined.

Payments that are royalties that fall under Article 12 or that are fees for technical services that fall under Article 12 A are not in scope, unless these payments cover a bundle of services were some do not qualify under Article 12 or 12 A. That part of the payment is then in scope. Even the gross payment can become in scope when the whole service requires only minimal human involvement.

While Article 12 A excludes payments by individuals for personal use from the definition of 'fees for technical services' these payments are in scope under Article 12 B. But contracting parties may opt to exclude them.

Collecting of user data itself is not in scope as a production factor for digital services so no gross payment for automated digital services is to be split and allocated to the jurisdiction of the user. This is a major difference with the choices under the Progress Report.

The part of the payment done between a linked payer and beneficial owner that forms an excess part of the gross payment, is not in scope.

Payments that are income that on the bases of all relevant facts and circumstances can effectively be connected to a permanent establishment or fixed base in the jurisdiction where the automated digital service is provided, are not in scope. The net profits attributable to the permanent establishment then divides the right to tax between jurisdictions.

Payments borne by a permanent establishment or fixed base of the payer in the recipient's jurisdiction are not in scope.

17. The Progress Report opted for a reported group profit that must be altered, split and in part distributed among market jurisdictions through the criterion of allocating revenue. Revenue is also allocated to that end for the mere collection of user data. This is fundamentally different and has the potential to cause disputes under the model convention of the UN that does not consider users for gross revenue allocation (see topic 3 hereinafter). However, when considering some non-fundamental changes of criterions under both approaches, these disputes may be prevented to occur.

- With an optional threshold :

18. To avoid excessive compliance spending when few payments are expected, a threshold may be inserted in the 2021 UN MTC updated tax treaty. Such as worldwide revenue or all revenue originating from digital activity by that entity or group that provides automated digital services in the market jurisdiction.

The Progress Report has opted for a mandatory threshold for worldwide group revenue. Could the 2021 UN MTC consider imposing a similar threshold for the mandatory taxation of groups on the base of qualified profit and not on the base gross payments? Such a choice lays now only by the beneficial owner.

- For a low tax rate on these gross payments :

19. A low tax rate of 3 to 4 % is recommended out of concern to limit unwanted effects of double or excessive taxation :

a) The tax increase may be passed on to customers in the market jurisdiction.
b) Limiting the risk that no effective tax credit can be given by the collecting jurisdiction, what may hamper the provision of the digital activity.
c) Some mixes of production factors may incur high costs so that their net income should not be overtaxed.
d) Influences of tax rates on foreign exchanges.
e) The relative nature of payments for automated digital services.

The participant finds rationale a), d) and e) not relevant ; one of the objectives of the whole exercise in updating tax rules for digital business models is to remedy in part their potential to cause disloyal competition in the market jurisdiction. When imposing similar fiscal and others costs to be shared by all competing companies in one jurisdiction, in respect of the requirements of non-discrimination, effects such as a), d) and e) may be seen as proof that the distortion of competition through digital activities is in part effectively addressed.

As for rationale b) and c) the participant finds that a more logical approach would have been to set margins (fixed percentages) per type of digital activity, to be multiplied with the market jurisdictions CIT. For instance, a fixed percentage of 20 % for a type of digital activity multiplied with a CIT of 20 % gives a 5 % effective tax rate on gross revenue allocated in that market jurisdiction and yields similar results for tax relief purposes as in the approach under Article 12 B UN MTC. But a variable fixed percentage can better take in account different mixes of productions factors by digital business models and distribute the taxing right in a more accurate

way in relation to wealth creation. Different fixed percentages can take fully in account the varying share of user data in the mix of production factors.

After all, revenue is not a production factor but the result of these factors. Payments (that is another notion as sales) should only become subject to taxation in the market jurisdiction for the share of production factors in the wealth creation in the market jurisdiction. For purposes of effective tax rates and fairness that demand that a minimum share of collected income be taxed in the market jurisdiction where wealth creation occurs, the results are similar between low tax rates on gross income or variable fixed percentages on gross revenue that are subject to the domestic CIT-rate. Preferably, the variable percentages per type of digital activity in scope should best be set identically under the UN and the OECD approaches.

Under the rule in international taxation that one income should be taxed once and only once, the 2021 UN MTC can also determine that the share of the variable percentage in the gross revenue that is going to the market jurisdiction must then be not subject to effective taxation in the other jurisdictions that must exempt or give tax credit in the corresponding share in the collected taxes on that gross revenue.

- originating from the market jurisdiction for automated digital services arising there :

20. Payments originating in the market jurisdiction made for automated digital services arising in a third jurisdiction are not in scope.

Payments originating from a third jurisdiction for automated digital services that have an obvious economic link with a permanent establishment or fixed base of the payer are deemed to originate in that jurisdiction.

Payments originating from a third jurisdiction that are borne by a permanent establishment or fixed base in the recipient's jurisdiction are in scope.

These rules must avoid a force-of-attraction principle that would be inconsistent with other provisions of the UN MTC.

21. Under the Progress Report an approach is presented that stands outside the OECD MTC treaty network, that covers a far larger part of digital business models but far less taxpayers given the limitation of its scope to multinational groups with very high revenue thresholds. The 2021 UN MTC that is part of the existing treaty network has no threshold and may therefor affect a far larger share of the digital economy even when limited to automated digital services. This raises the question on how disputes between both presented approaches will be organised and settled on the base of international tax and treaty criterions (see topic 3 hereinafter).

- with the jurisdiction of the residence of the beneficial owner of that gross payment that has to give tax relief :

22. For fear of tax avoidance that would place the collecting of gross payments in a tax friendly jurisdiction, an agent, nominee or conduit company acting as a fiduciary or administrator in the collecting jurisdiction is disregarded and the obligation to grant tax relief is passed on to the

jurisdiction of residence of the person that by contract or legal obligation restrains the recipient's right to use and enjoy the collected income that is passed on to that person (the beneficial owner). When the recipient is the beneficial owner, national or treaty anti-abuse provisions or other provisions that seek to undo effects of treaty-shopping can still shift the obligation to grant tax relief to another jurisdiction.

This approach submits the obligation to grant tax relief itself to anti-tax avoidance conditions.

23. The Progress Report has dealt with similar concerns of tax avoidance by disregarding the collecting of revenue in the criterions for allocating revenue by type of digital activity and altering the reported group profit with 10 modifiers. The approach under Article 12 B avoids such complexity but yields a poorer result in locating the creation of wealth by excluding the collection of user data.

In the participant's view, if a group chooses to concentrate in a region the collecting of revenue from its activities in a single jurisdiction that is tax-friendly through a low CIT-rate or large exemptions from taxation by special tax regimes, effective tax relief should be made subject to the substance over form rule and other measures that seek to undo the effects of tax planning through conduit companies. By lack of substance (location of production factors) and in presence of an effective taxation at low tax rates in the jurisdiction that collects the revenue, little or no tax relief should be granted to that group against the taxation occurring in the market jurisdiction on the digital activity provided there. See also the significant progress on Pilar II that requires a minimum taxation and that provides rationale and criterions for effective minimum taxation downstream or upstream.

- Option for the beneficial owner for taxation based on overall profitability or the profitability of each segment of automated digital services when available, on the level of the group the beneficial owner forms part of or on the level of his entity when no member of a group.

24. By concerns for effective tax relief under the credit method or when making losses, the beneficial owner may opt to be taxed on the qualified profit for each type of automated digital service he provided for in the market jurisdiction during the fiscal year (a segment of activity).

Qualified profit is the net basis for the whole fiscal year that is the result of 30 % of a profitability ratio applied on gross revenue. The beneficial owner must therefore keep segmental accounts that allow to determine that profitability ratio for each type of automated digital service. If not available, the overall profitability ratio of the beneficial owner will apply.

The profitability ratio is the result of dividing the annual profits by the annual revenue as revealed by the consolidated financial statements per segment or overall, when not available per segment.

If the beneficial owner forms part of a multinational enterprise group, the group's ratio applies on the level of segments or overall if not available unless these ratios are lower than on the level of the beneficial owner entity.

For concerns that relate to reflecting more accurately the fixed percentage with the underlying digital activity, avoiding complexity and the risks for excessive and double of multiple taxation, especially when the beneficial owner is in a loss situation and for protecting routine profits from taxation when no functions are performed in the source state, the Secretariat's note proposed (§ 48) an option that is quite similar to the approach under the Progress Report. When the beneficial owner opts for taxation on the base of profitability, the convention between these two jurisdictions can fix another fixed percentage in the qualified profits than 30 % and that percentage may be further reduced by a second fixed percentage that is a '*deemed return on routine functions for providing the automated digital service'*.

25. The difference between the two fixed percentages leaves on principle a minimal tax base to the market jurisdiction when this option is applied, whereas Amount 'B' in the Progress report is motivated as 'the Marketing and Distribution Profits Safe Harbour Adjustment' that requests to deduct the lowest of two amounts from Amount 'A' but grants no certainty for a minimum amount of taxes that should go to the market jurisdiction.

- For a fixed part of 30 %.

26. In order to avoid disputes and to provide certainty, qualified profits are 30 % of the amount arrived at by applying profitability to the local revenue in recognition of the fact that the entire profit arising from the market jurisdiction cannot be attributed to it. This percentage achieves on the one hand certainty and on the other hand a compromise for a fair and reasonable share to both jurisdictions, keeping in mind the special role markets play in generation of profits from automated digital services. Production factors of assets, employment and 'revenue in generation of profits' are given *equal weight in the balance.*

This rationale is but partially joined by the participant. Where the objectives of providing tax certainty and determining a fair and reasonable share for both jurisdictions are concerned, the participant finds that Article 12 B and the Progress Report (that sets the fixed percentage at 25 %), must take in account the different share production factors have in the various types of digital activity that can be allocated to the market jurisdiction where the digital activity is provided. The part of the production factor that can be allocated in the market jurisdiction stands next to the costs the digital activity needs in the market jurisdiction for its functioning. By attributing different fixed percentages in the altered profit under both Pillar I and Article 12 B 2021 UN MTC, varying for different types of mixes of productions factors in digital activities occurring in the market jurisdiction both tax certainty and fairness can be better applied since reflecting better the extend of wealth creation by the market jurisdiction.

The Secretariat's note on Article 12 B states (§ 41) that '*A large minority of members of the view that 30 per cent of group consolidated profits for net taxation may be too high and consideration should be given to bilaterally negotiating of a rate that more accurately reflects the particular facts and circumstances.'.* Varying fixed percentages per type of automated digital services responds to these concerns for accuracy.

27. The Progress report gives no perspective on a minimum taxation by the market jurisdiction, whereas Article 12 B does. A minimum taxation can be obtained by suppressing amount 'B' and use varying fixed percentages that grants the market jurisdiction less then 77,9 % of the

altered profit (10 % + 75 % of the remaining 90 %). Or when maintaining the fixed percentage of 25 % and amount 'B' to use these varying percentages as a minimum part of amount 'A' that always goes to the market jurisdiction.

28. The question that then arises is double ; what type of digital activity can be said to have a different mix of production factors in the market jurisdiction then other digital activities and what fixed percentage expresses this best ? These two questions will be discussed further in the next section under topic 1. On the base of the long standing criterion of wealth creation in international taxation, the scholar S. Buriak suggested[6] several digital business-models that can provide a rationale for taxing rights in market jurisdictions :

a) Business to Business to Consumer (B2B-2C) Model: a company operating the platform and business users that are retailers or service providers.

29. Such platform can collect end-consumer data to provide additional services like targeted advertisements of business users' products leading to an additional stream of revenue for the platform operating company and to added value for the services of the business users. In that regard, the data collected is an input into the wealth production process of delivery of targeted advertisement services.

Therefore, it is considered that the market jurisdiction where the end-consumers – being a source of income-generating data – are located should also be regarded as the place of origin of income since the main input in the wealth production process is extracted there.

b) Business to Consumer to Business (B2C-2B) Model : a company providing free services to build a base of potential consumers for business users, being the ultimate targeted customers of the platform.

30. The role of the end-users of the platform is to give consent to the collection of their personal data to be used in the marketing activities or sales in exchange for services received by the platform. Therefore, data collection (extraction) should be considered as a business function of the platform rather than a user contribution. Nevertheless, end-user data is a meaningful input into the wealth production process of social media networking and search engine businesses. Data is a product in itself in this model.

The data collection activity from the market jurisdiction being one of the main activities of the company in the wealth production process should lead to taxing rights being allocated to the market state since in that case, customer data is one of the primary sources of wealth for such companies. Therefore, for social-media platforms, taxing rights should go to the jurisdiction where the end-users are located and from where data is extracted.

c) Digital Media Platforms: a company uses personal preferences of the customers to offer personalized choices to the customers.

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[6] Svitlana Buriak, 'A New Taxing Right for the Market Jurisdiction: Where Are the Limits?', *INTERTAX*, Volume 48, Issue 3, p. 301 – 316.

31. The targeted advertisements are primarily based only on limited[7] personal information like gender, age, and location of the end-users. Therefore, the role of end-users in the wealth creation process of digital media platforms is present.

d) Business to Customers (B2C) E-Commerce Model : the question in Madam Buriak's view is whether companies merely selling their products in other jurisdictions through websites and applications should be within the scope of a new taxing right of the market jurisdictions if the new right is based on the principle of origin of income and not on the destination-based approach.

32. The participant has another view on the E-Commerce Model then Madam Buriak with regard to the criterion of wealth creation. Web shops can also use information of users to incite them to buy the goods bought by the company running it, rather than those of the goods of other competing companies that are also put up for sale in that web shop. Web shops of companies that produce their own goods or services will typically mainly or only present that group's products on their websites. Customers have a role of wealth creation in web shops that mainly offer goods produced by other groups.

Madam Buriak considered that the destination-based cash flow tax is grounded on merely practical aspects of the prevention of tax avoidance and the race to the bottom imposed by tax competition in the long run. Other considerations justifying destination-based taxation are that the customer-based intangibles are located in the jurisdiction of the final purchaser and that the benefit principle may at least to some extent justify the allocation of taxing rights on a destination basis[8].

Companies that just sell goods or services over the internet they did not produce are eligible to qualify for this model in the participant's view since they present a risk for tax avoidance by not having a physical presence in that jurisdiction. This rejoins the first motivation for destination-based taxation: addressing and preventing tax avoidance.

Also, what is the rationale to consider that goods and services from various companies sold on platforms qualify and goods and services from various companies sold on websites do not? The type of digital medium seems irrelevant.

Finally, the participant considers that destination-based taxation as a tool to address tax avoidance is justified in the presence of groups that produce 'tools of connectivity' such as

[7] The participant finds that all personal information is considered relevant for marketing purposes. Even the location.

[8] Svitlana Buriak, *l.c.*, p. 302, § 6 with reference to B. Moreno, A Note on Some Radical Alternatives to the Existing International Corporate Tax and Their Implications for the Digital(ized) Economy, 46(6/7), *Intertax* 560, 561 (2018); M. Devereux, Pillar One: First Step Towards a Destination-Based Tax?, 1461 *Tax J.* (16 Oct. 2019), https://www.taxjournal.com/articles/pillar-one-first-step-towards-a-destination-based-tax (accessed 28 Jan. 2020). See also B. Rajathurai & M. Clayson, Unify and Conquer: The OECD's 'Unified Approach' to Pillar One, 1461 *Tax J*. (16 Oct. 2019), https://www.taxjournal.com/articles/unify-and-conquer-the-oecd-s-unified-approach-topillar-one (accessed 28 Jan. 2020); J. Li, Global Profit Split: An Evolutionary Approach to International Income Allocation, 50(3) *Can. Tax J.* 823, 866 (2002); M. F. de Wilde, Comparing Tax Policy Responses for the Digitalizing Economy: Fold or All-in, 46(6/7) *Intertax* 466, 473 (2018).

laptops, smartphones, tablets, etc. These products typically have a large portion of their price to cover Intellectual Property Rights that can be shifted at leisure over the globe by that group. They are also equipped for harvesting data of their users or even communicate information after the sale. So, groups that sell tools of connectivity they produce should also be included in this business model.

33. By considering the harvesting of user data as an essential production factor of digital activity, rationale is provided for allocating revenue to that jurisdiction. It becomes however equally clear that not all digital business-models have an equal need of harvesting user data, so differences in wealth creation occur in the market jurisdiction. Different percentages for granting taxing rights are a logic consequence.

The choice made in the Progress Report for one single percentage of 25 % for the market jurisdiction should be reconsidered in any event for differentiation per type of digital activity and for a minimum percentage that must go to the market jurisdiction when concerned for :

- A minimum effective tax amount for the market jurisdiction, determined with respect for production factors located in both the workshop jurisdiction and the market jurisdiction.

- Fairness in better capturing the part of wealth created in the market jurisdiction and fairness in sharing the costs that the digital activity lays on the market jurisdiction and that must be paid for by all competing companies and not only by the taxpayers that have presence in that jurisdiction.

- Simplicity for developing countries that prefer opting for withholding taxes on payments originating from their territory. That requires a minimum amount of taxes that can be determined for setting the criterions for withholding taxes that not trigger reimbursing part of the collected taxes.

- Enhanced compatibility between jurisdictions that opted to implement Article 12 A and/or Article 12 B of the 2021 UN MTC and jurisdiction that will join the IF MLC and reduce so potential conflicts that may arise.

For instance, the low tax rate percentages on gross income the UN tax committee advised when opting for Articles 12 A and 12 B under the 2021 UN MTC, yields a minimum tax that takes in account the risk of over taxation between jurisdictions. A similar minimum tax yield on the share of excess profit that is to be distributed through allocated revenue among market jurisdictions and that is then taxed at that market jurisdictions CIT, can be obtained by using a variable percentage per type of digital activity instead of a fixed percentage of 25 % for all.

Both systems could then be better aligned and adjusted towards a middle ground if the Un tax committee recommends in turn similar differences in the low tax rate on gross income according to the type of digital activity.

B. The option for a Margin per type of Digital Activity (MDA) for determining amount 'A'.

34. As stated in the previous section, the participant suggests setting a percentage per type of digital activity that uses a different mix of factors to create wealth. This captures the wealth creation more accurately by favouring in principle the production factors in the workshop jurisdiction when factors in the market jurisdiction are contributing less, while assuring a minimum income for the market jurisdiction and providing a minimum fixed base for withholding taxes on revenue collected in that jurisdiction.

In his submission of November 2019 on the Unified approach, the participant pointed out that the effects of digital activities relate to far more than avoiding taxation in the market jurisdiction but also avoiding to pay for different costs the market jurisdiction suffers from the digital activity being provided in its territory. These costs are in the end paid for by the sole taxpayers that are present in the market jurisdiction. A minimum tax level that takes for example in account the need for energy and telecommunication leads to a fairer balance for all companies engaging in that type of digital activity (tax distortion and location savings) and for all taxpayers in the market jurisdiction (costs).

For instance, in Belgium up to 50 % of the capacity of telecommunication networks are used up by providers of digital activities that do not share in these costs that must be borne by the users present in that market jurisdiction. Hugh quantities of electricity are needed to feed the functioning of the tools of connectivity and the telecommunication network. Governments in the market jurisdiction must organise the transportation of electricity, increase renewable sources of electricity and lay that burden now on the sole taxpayers that are present there.

Doesn't fairness then not require when determining the percentages to look not only at the mix of production factors in the market jurisdiction but also at the lower or higher level of costs that a type of digital activity can be expected to trigger in that jurisdiction?

B.1 Tax distortion by digital activity in the market jurisdiction.

35. The risk of tax distortion implies selecting relevant types of digital activities that are business models with increased risk of optimisation of allocation of digital activities and/or income outside the national territory:

- Companies that offer free services and both free and paid digital information services to users form the first two business models.
- Companies that sell goods in the digital economy that typically include high percentages of royalties or patent rights in the price or that mainly offer goods through digital activities form the third business model.
- Companies that mainly offer other services then digital information services through digital activities form the fourth business model. Digital trading and web-based tools of payment activities form a sub category of that business model.

1) Free of charge users and free services:

36. This business (line) model relates to all companies that are mainly interested in worldwide merchandising (1) of their website users and the data collected from them (2). To improve collecting this data they offer their users free of charge access to data or services (3).

Such models as the likes of Google, Facebook, Twitter, Skype or more generally all forms of free access (1) through digital interfaces (2) to digital information or communication (3) with a commercial intent for the provider (4).

37. These enterprises provoke major shifts in other business models by communicating commercial information to their users, which results in both winners and losers in other enterprises in the national territory. So they give cause for high economical distortion. They commercialise the data of their users worldwide as a business model.

Their profits are high (1) because they do not pay these users for input (2). They do not bear a fair share in costs (3) of electricity and telecommunication paid for by their users and organised or provided for through the general budget of that jurisdiction.

2) Paid information or communication services for standardised data:

38. This business (line) model refers to paying websites such as the press or similar companies like Netflix and HBO or in general all access offered through digital interfaces (1) of non-personalised or standardised information or communications (2) that require payment (3). Telecommunication services providers included.

Various information sites such as newspaper websites, television channels on web, … correspond to this business model. This business model is taxed by classic means on the fees collected from paying users in the market jurisdiction. But allocation tools for collecting income outside the national territory can hamper that profit tax base for the State where these paying users reside.

Paying users, like free users, also give rise to data mining and advertising all over the world. Free of charge business models could be tempted to avoid taxes by charging rather symbolic subscription fees. Some business models mix both free of charge and paying users.

39. The impact of this business model on national job loss or creation of dependent contractors is low to zero; the value of user input is minimal and profits do not seem to be particularity high.

These business models rely heavily on connection tools and large amounts of electricity to send images, and wireless connections to operate them, provided by their users and by regulated telecommunications networks that are maintained by government entities (1). They can commercialise their user data and invoice outside the national territory, so part of their income from digital activities in the national territory escapes taxation. There is a high risk for tax distortion (2).

3) Digitally sold goods and material digital interfaces:

40. Music, movies, books, clothes… are ordered through websites in increasingly large quantities. But the producers of goods frequently have websites themselves where they propose to sell and ship directly to their clients. The criterion of ordering goods through digital interfaces is far too wide to constitute a relevant digital activity that could cause tax distortion.

This model basically allows constant harvesting and sending data of the user through connected devices and needs energy and telecommunications network day and night. When entering preferred choices in the buying process, user data is also collected.

Tax and competitive distortion occur when prices for the sold items are set at loss levels to get these devices to operate in a larger share of the market, yielding thus more profits on the selling of the harvested data. In that combination, entire sections of the market jurisdiction's economy can be wiped out or must lower their profit margins to a near loss while not having compensating profits from selling their user's data and choices. That highly disruptive process is accelerated in absence of updated tax rules on wealth creation and sharing of costs that enhance the level playing field between competing companies in the market jurisdiction.

4) Paying digital services other than standardised data / information transfer:

41. This business model aims at offering or organising (1) personalised services other than non-personalised information or standardised communication (2) as an intermediary or directly (3) through digital interfaces (4) and in exchange for payment.

Call centres, traders or web-based paying services can be set up all over the globe without requiring physical contact with clients. Risks of relocating income collection or parts of the digital service are high here. Location saving also allows presumption of high profits through avoided costs.

The combined criteria 1 (offering or organising services in the national territory) & 3 (through digital interfaces) such as home rental, exclude services that are generally not conducted through digital interfaces. They usually require a meeting in person with the client (doctors, lawyers, architects…). Their income is reported in the nation and they cannot legally sell their clients' data when prohibited under their legal privilege. The exclusion of these paying services that are supplied digitally would only apply to the direct providers of these services, and not to digital intermediaries that organise them. These criteria relate in turn to business models such as AIRBNB.

The combined criteria 2 (qualifying the intermediary under the same requirements as a direct provider) & 4 (reporting (electronic) payments originating in the national territory) react to CFC / BEPS in the business model to create / preserve a profit tax base where it originated. This measure seeks to address services that claim to have been contracted through a non-resident company but that are entirely or mainly carried out by a national contractor that is in some way dependent on that company for providing his services and not through a direct request of users to him personally for those services. Business models such as UBER or DELIVROO are examples

where algorithms decide if a contractor can pick up a client or goods and how much he can expect to gain for that.

42. This type of business model also includes a variety of tokens-platforms that offer data (tokens) that are directly or indirectly convertible into legal currencies. The platforms that sell or buy tokens that can be used for access, services, goods, crypto-currencies (bartering of data) fall within the scope of this business model.

For safe harbour and allocation of revenue purposes, these token-platforms should declare alongside sales in legal currencies, the increase (or decrease) over the past year of their crypto-currency portfolio in tokens (in monetised value) that relate to operations with a link to the national territory of the market jurisdiction (connections, users or contracts). The increase in the number of tokens convertible to legal currencies can then contribute to calculating the worldwide tax base and the portion of income allocated to the market jurisdiction. For personal income tax purposes (capital gains, inventories, etc.), platform users may also be required to report the yearly evolution of their convertible stock of 'tokens'.

B.2 Costs provoked by digital activities in the market jurisdiction.

43. The other criteria that can then be applied to these various business models pertain to profits (ability to pay principle), user input of data (wealth creation principle) and avoidance of costs caused under that business model (benefit principle) such as the electricity and telecommunication required by users that are regulated and/or publicly provided for in their jurisdiction and avoided local costs of functioning (location savings profits).

Avoiding payment of taxes in the same extend as the taxes that are paid by resident companies on their gross revenues and that do not seek to or can avoid these costs is but a way of making profit for non-resident companies that on the same enjoy benefits through publicly financed services their competitors also pay for. This warrants the presumption of profits made by the digital activity in the market jurisdiction through both avoided tax and costs.

Other disturbing effects of digital activities may require measures to partially compensate the costs they avoid (horizontal equity point of view):

a) Replacing existing business models with digital activities triggers costs for the market jurisdiction : job losses, empty business spaces and schooling the unemployed for a job fit for the digital era. This has an effect on national budgets.

b) There is an environmental effect: human jobs that are supplanted by algorithms require more servers. Those servers create heat that needs cooling and a constant increase in supply of electricity. Already in 2019, global pollution produced by servers was considered to exceed all air traffic pollution worldwide.

c) Increased traffic from package deliveries is also an element that national governments must take into account in their national mobility and environmental policies.

d) Protection of consumer rights is affected. How can consumers be given equal protection as required of resident companies? What response can be made to hate mails, trolls, fake news that affect both civil and corporate interests and democracy itself?

e) Financial institutions have not yet felt the full force of another development of digital activities that relate to cryptocurrencies. These developments are best addressed with reference to monetary history – central banks were created in the past to address the financial instability caused by bank notes issued by various banks and companies that frequently went bankrupt. An analysis of monetary history could prevent major financial disruption. National financial supervisors and regulations will have a key role to play in avoiding such disruptions.

   All sorts of taxes on financial transactions, revenues and capital gains that are now collected or supported by banks or insurers will not apply to competitors that trade tokens. This distorts an even playing field in payment services, saving and investing. National financial institutions are also subject to a national supervisory authority to maintain security of the saving accounts of national residents. How can they reasonably be expected to cost compete with non-resident enterprises not subject to such regulations? From the standpoint of consumer protection, shouldn't new players that offer tools of payment that reach a certain size of activity be subject to the same compliance as financial institutions?

   Not regulated financial services are out of scope in the Progress Report ; does this mean that jurisdictions are free to try to tackle this issue under the existing treaty-network?

f) Should a person still equally be entitled to public welfare (social housing, minimum income, lower prices for using public services) when he or she holds large volumes of tokens that can be monetised?

44. The SCOTUS ruling of 21 June 2018 in the case *State of South Dakota v. Wayfair*[9] applies horizontal equity by considering that:

- only resident companies still pay taxes, which disturbs the even playing field among competitors and among states that can no longer meet their financial obligations,
- consumers who buy local products pay taxes that other consumers avoid by ordering from another State,

and vertical equity:

- the requirement of a threshold of activity or income before a digital activity can be taxed (safe harbour).

[9] https://www.supremecourt.gov/opinions/17pdf/17-494_j4el.pdf

Only when the activity of a non-resident company is deemed to have a relevant size, does it become fair under this ruling to tax gross income in the market jurisdiction, so that this competitor contributes also to the general budget.

That ruling also specifically states that fairness dictates that major loss of public finances must be addressed in an economy where up to 10 % of commercial transactions have become digital and considers on fairness (p. 17 ruling):

> *"But there is nothing unfair about requiring companies that avail themselves of the States' benefits to bear an equal share of the burden of tax collection. Fairness dictates quite the opposite result. Helping respondents' customers evade a lawful tax unfairly shifts to those consumers who buy from their competitors with a physical presence that satisfies Quill—even one warehouse or one salesperson—an increased share of the taxes. It is essential to public confidence in the tax system that the Court avoid creating inequitable exceptions. (..) In the name of federalism and free markets, Quill does harm to both. The physical presence rule it defines has limited States' ability to seek long-term prosperity and has prevented market participants from competing on an even playing field."*

45. Given these considerations, horizontal equity can be said to mean that:

(1) comparable sizes or types of digital activities in the national territory contribute on similar shares of their national turnover since they 'consume' comparable quantities of public services, such as roads, electricity produced and distributed, regulations on telecommunication providers and networks, safety of payments...

(2) value is created by user input in the production process of digital activity,

(3) businesses models with effects that entail higher costs to the nation, contribute a larger share of their income (a 'cost principle' for supplanting other businesses or human functions with effects on national budgets). Such costs include loss of tax income, job losses, idle buildings, costs of educating the unemployed, use of skilled employees..

and vertical equity can be considered to mean that:

(4) higher profits justify higher taxes (ability-to-pay principle),

(5) larger businesses must be prevented from exploiting their size to elude taxation (BEPS),

(6) and smaller businesses should be exempted (safe harbour).

An effective perception of taxes from all taxpayers to contribute in the costs must be organised from a fairness point of view ; a minimum percentage (margin) per mix of factors by a digital activity and its effects in the market jurisdiction are required to achieve that objective.

B.3 MDA per mix of production and cost factors for a type of digital activity in scope.

46. The tax base in the allocated revenue can be determined through weighted margins per type of digital activity (MDA) counting for 5 % each of the following effects and properties :

- the risk of avoiding tax costs (T),
- the high profit margin for that type of business (P),
- the value of user input in production (U),
- avoiding payment for costs generated such as provoking high use of electricity by users in the market jurisdiction (C),
- location savings that refer to the ability to set prices targeting resident competitors and thus causing job losses or the ability to substitute workers by independent contractors (S).

The four selected type of digital activities under the criterion of their aptitude for organizing tax avoidance, have a different mix of production factors they rely in the market jurisdiction or costs they trigger there :

1) Free of charge users and free services:

47. A margin of 15 % is proposed under the four criterions of tax, profits, users and avoiding costs. The participant does not propose 20 % by considering that the revenue attributed to *free* users and services must be typically allocated to market jurisdictions through some sort of formula. The lower MDA of 15 % seeks to compensate for a possible over allocation of revenue. The more the formula that allocates revenue can avoid this risk for over allocation, the stronger the case becomes of setting the MDA at 20 % for this type of digital activity.

2) Paid information or communication services for standardised data:

48. This business model can be set at a 10 % margin for that type of digital activities (transmission of non-personalised information or standardised communication to a large audience against payment or partially free of charge when related to such communication) has need of low user input but requires a high use of electricity and telecommunication capacity in the market jurisdiction (costs) and can be organised entirely or partially outside the jurisdiction for tax avoidance purposes (tax).

3) Digitally sold goods and material digital interfaces:

49. Goods produced by the group that sells them and material digital interfaces produced by groups such as APPLE, SAMSUNG, HUAWEI are proposed at a rate of 15 % because their profit margin can be assumed to be high (profits) as can be their ability to tax engineer (tax). The third effect taken in consideration is the need for electricity and telecommunication provided for in the market jurisdiction (costs). Even though the sold material digital interfaces have the potential of harvesting data, this user effect is considered to result from the use of the interfaces that falls either under the free users / services or the paying users / services digital business models.

50. But the sale of goods exclusively through internet by companies that usually do not produce these goods by groups such as ALIBABA, AMAZON etc.. are highly disturbing for other existing business models with great job losses as a result in traditional activities such as retail sales (social costs). They do not contribute to these costs. They can for example also avoid tax cost easily on their earned commissions on sales. They also cause increased traffic (through

various contractors) and pollution, so a higher margin of 20 % can be seen as 'fair' in the light of these combined four effects.

Some may object that the goods are usually sold at bottom prices by players such as AMAZON and question the factor profit in the mix of four criterions. The sale of goods at bottom prices is usually motivated for capturing a larger share of the user market and to subsequently monetize the data and choices of these clients. The participant proposes to maintain the profitability factor as high on these sales since they lead indirectly to high profits from merchandising the data of the users.

4) Paying digital services other than standardised data / information transfer:

51. As this type of business model has the highest potential of supplanting national employment by international relocation or substitute workers into independent contractors, the highest margin of 25 % seems appropriate since the value of user input is high (1), use of telecommunications services and electricity is high for reasons of constant monitoring by algorithms rather for visualising images (2), profits are high (3), costs avoided in the market jurisdiction are high (4), risks of avoiding tax costs are highest (5) through intra-group 'rights' or 'costs' to be paid by resident enterprises or physical permanent establishments.

52. The proposed margins per type of digital activity that uses a different mix of production factors that trigger effects in the market jurisdiction can be summarised as :

Wealth creation in the market jurisdiction by users (S. Burak).	type of digital activity with different mix in production and cost factors	margin
Digital Media Platforms Model (Paying services for information or standardized communication)	Paid services for information or communication of standardised data.	10 % T & C
B2C-2B Model (Free Users of Free services)	Free of charge users or free services.	15 % T & U & P
B2C E-Commerce Model & B2B-2C Model (sales of goods by the internet)	Sale of goods that include substantial intellectual property rights in the price than can be used as connection tools. Online sale of goods at standard market prices.	15% T & P & C
	Online sale of goods that are not produced by the seller and sold at bottom prices with an overall reported high profit for that group.	20 % T & U & P & S
B2B-2C Model for services with few data input (Web-payments / traders / token-platforms.) & B2C E-Commerce Model & B2B-2C Model (Paying personalized services)	Paying services for personalised data or services / web-payments / traders / token-platforms.. (except professions that cannot legally sell their clients' data to third parties and must generally meet clients in person).	25 % T & U & P & C & S

B.4. No need for amount 'B' under MDA.

53. In his submission of November 2019 on the Unified Approach, the participant suggested to divide the allocated income to the market jurisdiction into three parts. Applying so the leading principle that one income can be taxed once and only once.

- A large part is reserved for taxation by the country of residence of the provider of the digital activity, since expenses are deducted from that tax base (servers, office space, programmers, administration) in that country (the workshop jurisdiction).

A share of 50 % can be considered to compensate the deductible costs for production factors that were set of against report profit in the workshop jurisdiction.

- The remaining allocated revenue is then considered profit to be divided through a profit margin between the market jurisdiction on the one hand and the workshop and the counter jurisdiction on the other hand that must exempt or allow credit for the taxes levied by the market jurisdiction.

By not exceeding a maximum profit margin of 25 %, the market jurisdiction can be considered to leave an equitable share of the profit to serve as either further deduction of costs or taxable profit in other jurisdictions. In theory, profit is thus divided equally between countries where 'prosumption' sensitive digital activities occur and other production factors are located.

Business (line) models can be singled out for their use of production factors in the market jurisdiction (wealth creation). Both vertical and horizontal equity are further applied while considering the potential for profits (ability-to-pay principle) and avoiding sharing in the costs they need (benefit principle) (costs). For purposes of fairness, they share in costs they provoke (social costs) and risks of avoiding taxation of digital activities (avoiding tax costs) that creates competitive distortion. The five factors result in a weighted margin between 10 % and 25 %.

54. The participant understood that the requirements for amount 'B' in the Unified Approach relate in substance on how to divide income in a fair way between the jurisdiction where the assets are located that produce in part the digital activity and the market jurisdiction. In jurisdictions with physical activities that relate to the digital activity a fair amount of taxable income must be preserved under the approach since these jurisdictions suffer depreciations on assets and salary costs that reduce their tax base.

Both resident and non-resident enterprises using digital activities bear less than a fair share of the general costs they induce of :

- job loss due to replacing human functions with algorithms,
- reduced social welfare contributions through creating contractors that mainly depend on executing decisions of algorithms,
- increased pollution from individualized package deliveries and massive returns,
- costs of carbon-free production and storage of electricity to constantly supply these activities on the national territory and costs for reinforcing electricity networks both

upstream and downstream from the various points of carbon-free production of electricity (solar panels on buildings, windmills etc.,
- cost for supervising telecommunication networks and electronic payments.

The method of using weighted margins to determine the tax base for these activities is more objective since it includes the share of profit that was made by avoiding a proportionate contribution to these general costs by both the resident and non-resident enterprises.

55. The extend of created wealth in the market jurisdiction that triggers the right to tax, is the result of a mix of production factors that may vary per type of digital activity and so requires per different type of mix of digital activity production factors a differentiation in the part of the allocated revenue that can be taxed by the market jurisdiction. Setting a fixed percentage of 25 % in all allocated revenue that is used to distribute the split reported profit can be said to disregard these different mixes in production factors used by various digital business-models.

The correction the Progress report proposes on the taxes that can go to the market jurisdiction by deducting a Marketing and Distribution Profits Safe Harbour Adjustment where a factor 'Y' is to be determined freely by both jurisdictions is in the participant's view not consistent with the objective of effective taxation by the market jurisdiction, the need to provide to developing countries a minimum tax base they can opt to use for withholding tax purposes and the prior choices in the Progress report to use allocated revenue to distribute the altered profit among market jurisdictions. Indeed, production factors are no revenue. They should be taken in account when determining the share of altered profit that goes to the market jurisdictions and have been taken in account already by leaving 10 % of the altered profit out of scope and fixing a maximum percentage of 25 % in the remaining altered profit.

56. Where the objectives of providing tax certainty and determining a fair and reasonable share for both jurisdictions are concerned, the participant finds that Article 12 B and the Progress Report (that sets the fixed percentage at 25 %), should take in account the different share production factors have in the various types of digital activity that can be allocated to the market jurisdiction where the digital activity is provided. The part of the production factor that can be allocated in the market jurisdiction stands next to the costs the digital activity needs in the market jurisdiction for its functioning. By attributing different fixed percentages in the altered profit under both Pillar I and Article 12 B 2021 UN MTC, varying per different types of mixes of productions factors in digital activities occurring in the market jurisdiction, both tax certainty and fairness can be better applied.

The Secretariat's note on Article 12 B states (§ 41) that '*A large minority of members of the view that 30 per cent of group consolidated profits for net taxation may be too high and consideration should be given to bilaterally negotiating of a rate that more accurately reflects the particular facts and circumstances.'.*

Varying fixed percentages per type of automated digital services responds to these concerns for accuracy.

B.5 How to organise a withholding tax under the system presented by the Progress Report?

57. Withholding taxes may be best organised under the approach of the Progress Report as down-payments:

a) Ask quarterly 'down-payments' for the amount 'A' that will be due that fiscal year. The portion of such a quarterly down-payment can be set at 20 % of the amount 'A' due by the group for the prior fiscal year.

   The gap of 20 % is to leave room for a decrease in income by fluctuation of business and claims for refund when the formulas lead to oversized allocation of revenue.

b) When the amount 'A' is known, the remaining amount is collected or reimbursed.

In the first year of the implementation, no withholding taxes can be levied. When applying this system under the UN MTC approach, one can substitute amount 'A' by the gross revenue that originates from the market jurisdiction.

58. When considering a withholding tax as a percentage on each payment that goes to providers of digital services in the market jurisdiction in a similar way as organised under Article 12 B 2021 UN MTC but in the context of the Progress Report and in order to limit the risk for reimbursement of collected withholding taxes, one could think of :

- Determine a minimum amount of taxes that always goes to the market jurisdiction at a 30 % gap of the estimated amount 'A'.

- Divide that minimum amount by the reported payments originating in that market jurisdiction in the prior fiscal year by the group to obtain the rate of the withholding tax on the payments occurring during the ongoing fiscal year.

- On principle, taxes will be due when amount 'A' is known, given the 30 % gap and given the share of payments that did not originate in the market jurisdiction but also qualify.

- The lower the gap is set, the higher the risk for reimbursements to the group when payments are less than the prior fiscal year.

- Use credits against future withholding taxes when the group proves the paid withholding taxes exceeded the amount that should go to the market jurisdiction.

In the first year of the implementation, no withholding taxes can be levied. When applying this system under the UN MTC approach, one can substitute amount 'A' by the gross revenue that originated from the market jurisdiction.

Topic 2 : Should the jurisdiction that holds the recipient not be the first to grant tax relief?

59. The rationale for this topic has already been given above (see §§ 24-25 that commented on the notion of the beneficial owner under article 12 B 2021 UN MTC). Fairness demands that tax relief is given first by the jurisdiction that holds the best cards for taxing the digital activity effectively.

When gross revenue for a region or worldwide is collected in a jurisdiction ('counter' jurisdiction) that is no workshop jurisdiction where taxes can be raised on assets and other factors in order to compensate for the tax relief, these jurisdictions have the first shot at taxing the revenue collected by conduit companies in their territories and should therefore be the first to give tax relief.

It seems then fair that in presence of a 'counter' jurisdiction, the obligation to grant tax relief goes first to the jurisdiction where the revenue is collected and reported. It is after all that revenue that is to be allocated as a part of the altered profit to the market jurisdiction. The participant therefor suggests putting the 'counter' jurisdictions before the workshop jurisdiction when determining a mandatory order to grant tax relief.

This also serves the objective of leaving enough tax base in the workshop jurisdictions where depreciation of assets and salaries reduce the tax base. The workshop jurisdictions are then only exposed to tax relief to the extend the counter jurisdictions fails to grant effective tax relief under the credit method. Putting the counter jurisdiction first in the obligation to provide tax relief has the effect of assuring a 'fixed return' with 'distribution function'.

60. If the counter jurisdiction opted to organise tax friendly effective tax rates on gross revenue that has no link with underlying digital activities in their territory, they should suffer exoneration or credit all together. If CIT levied on the collected gross revenue is largely or entirely reimbursed to the group, that jurisdiction would have a clear incentive to review its tax policies.

The part of credit that could not be effectively organised by the 'counter' jurisdiction should then go to the workshop jurisdictions as proposed by the Progress Report.

If a jurisdiction holds production factors and therefor qualifies as part workshop jurisdiction and part as a counter jurisdiction, the share in the overall production factors could be transposed as a ratio on the collected gross revenue. The part of the collected revenue that exceeds that ratio falls under the 'counter' jurisdiction tax relief obligation; the other part follows the rules for workshop jurisdictions.

61. Over taxation our double or multiple taxation may occur when profit margins in a group are significantly lower than the presumed MDA for that type of activity. But when competing on price, low profit margins are often a competitive tool used to gain market share and may have been intended for the purpose of price setting or be the result of investments or other free choices on indirect costs.

The presence of over taxation must not only be considered from the perspective of how the group subject to that MDA is organised, but how competitors using that business model set their prices and profit margins.

In some cases, as a result of the effective taxation of digital activities, prices will increase. In that way, unfair price competition will be lessened and fairness in taxation is improved in general.

62. As considered above (§ 22) the approach under Article 12 B 2021 UN MTC considers that payment collected in a counter jurisdiction should be designated to the jurisdiction of residence of the beneficial owner for giving tax relief.

This approach applies anti-tax avoidance measures on the obligation of tax relief itself.

The participant favours approaches in the field of digital activities that considers submitting tax relief to similar provisions as the substance over form rule and other measures that seek to undo the effects of tax planning through conduit companies. This is justified by the ability of digital activities to organise a 'above territories' activity. By lack of substance (location of production factors) and in presence of an effective taxation at low tax rates in the jurisdiction that collects the revenue, little or no tax relief should be granted to that group against the taxation occurring in the market jurisdiction on the digital activity provided there. This outcome also guarantees the tax income for the jurisdictions that have production factors in their territory.

63. If this option would be considered under the Progress Report, the first jurisdiction to grant tax relief would then be the that of the beneficial owner of the collected gross revenue.

Since the profit is determined on the level of the group, that would mean that it would be generally up to the group's HQ jurisdiction as the beneficial owner to grant tax relief for all amounts 'A' due by the group worldwide. These HQ jurisdictions would typically be major workshop jurisdictions that could not tax the worldwide gross revenues.

This unintended effect could however be mitigated by reserving the anti-tax avoidance beneficial owner rule for those jurisdictions that have the residence of the beneficial owner without a qualified minimal share of the group's production factors. If a certain quota of the production factors lays within that jurisdiction, counter jurisdictions are then again determined by the criterion of collecting the gross income worldwide or in a region.

Topic 3 : Living apart together?

64. The Progress Report sets out a system that reflects the 'above territories' nature of digital activities ; it organizes taxation and tax relief next to - but not above - the existing tax treaty-networks under the OECD, UN and US MTC. The legal framework to that end will be laid out in a multilateral convention that will be drafted by the Inclusive Framework.

Various issues may arise with Articles 12 A and B 2021 UN MTC that organized a taxation of digital activities within the existing UN MTC treaty-network. In the first two topics of this contribution some differences with the Progress Report were mentioned:

a) The scope is limited to payments for Fees for technical Services and Automated Digital Services and the production factor represented by users for digital activities is not considered (§ 16).
b) Taxes are levied based on gross revenue in the jurisdiction were the payment originated (§§ 17 - 21) unless that payment can be attributed to fixed bases or permanent establishments of the payer there.
c) By lack of a threshold on the level of entities and groups, far more taxpayers are concerned (§ 18). But a threshold is considered as optional.
d) The obligation for a jurisdiction to grant tax relief is subject to anti-tax avoidance measures (§ 22) and lays on principle in the jurisdiction of the beneficial owner when the recipient holds no economical decision right over the collected payment.
e) The option to be taxed based on altered group or entity profits for a segment or all digital activities in scope resides with the beneficial owner of the group or the entity when not part of a group (§ 24).
f) The altered profit for a segment or overall activity is determined by a profitability ratio that are the profits as reported dividend by the gross revenue from a segment or overall activity (§ 24).
g) The tax base is the qualified profit that are 30 % of the profitability ratio but jurisdictions may opt for another margin and set a second margin for routine profits that lowers the first margin. Jurisdictions may opt for varying margins in general that express more accurately the presence of production factors (§ 26).

65. As they stand today, the potential for conflict is high between both approaches and between these approaches and the existing treaty-networks. One could think quite easily of three cases:

- Members of a group that qualifies under both approaches are established or present in jurisdictions that opted for the MLC, in jurisdictions that opted for the 2021 UN MTC approach, in jurisdictions that follow the UN MTC but did not opt for the 2021 UN MTC approach and in jurisdictions that follow the OECD MTC but not the MLC.
- The jurisdiction of the beneficial owner that must give tax relief has opted for the MLC approach or did not opt for the 2O21 UN MTC update.
- Major workshop jurisdictions that must grant tax relief under the MLC are in jurisdictions that did not adopt or implement yet the MLC into national corporate tax law..

As a whole tax certainty and effectiveness are unsure without dispute resolutions mechanisms joined by all jurisdictions.

66. However, given the case-law of the CJUE on tribunals that were created under tax-treaties among Member States of the European Union that cannot supersede Union law since only the CJUE can interpret Union law under Article 267 of the Treaty of the Functioning of the European Union[10] and the CETA-opinion rendered on 30 April 2019 on the request of Belgium that also gives a set of requirements under Union law before the European Union and its Member States can join treaties that organise tribunals with third countries[11], adopting an MLC that organizes a dispute resolution mechanism before a new international tax court may prove difficult.

For disputes among Member States of the European Union on tax issues, the Directive of 10 October 2017[12] organized a tax dispute resolution mechanism that grants an enterprise or a permanent establishment in a Member State recourse before tax judges of both the Member State of residence and in the Member State of the source of the taxed income when those Member States do not come up with a timely remedy for double taxation under the procedures organised by bilateral tax treaties.

The national tax judge can then activate an international arbitration and the outcome of that arbitration can be enforced by the court when not willingly executed by that Member State. By having a digital permanent establishment within a Member State of the European Union, non-resident enterprises can also invoke, alongside dispute settlements organised under treaties, this hybrid form of partly judicial mandatory arbitration organised under Union law when subject to alleged double taxation *between* Member States on their digital activities.

For the United States of America, when joining the MLC, it can be expected the MLC and its federal transposition will suffer a test under the American Constitution by the Supreme Court of the United States.

In any event, no MLC can include all jurisdictions so disputes on tax treaties obligations with jurisdictions that follow the other approach or neither approach will fall within the jurisdiction of the International Court of Justice. Therefore, only the International Court of Justice is in the view of the participant eligible to settle the future conflicts that may arise between jurisdictions of taxing group profits over tax treaties, the IF MLC and the 2021 UN MTC Update.

67. A conflict between treaties can be settled through interpretation of the provisions that must be applied in a changing context.

An ambulatory interpretation under Article 3(2) OECD MTC is no treaty override to the extent that the application does not exceed the limits established by the treaty[13]. Terms that are

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[10] CJEU, 6 March 2018, case C-284/16, *Achmea BV v Slovacian Republic*, ECLI:EU:C:2018:158

[11] https://curia.europa.eu/jcms/upload/docs/application/pdf/2019-04/cp190052en.pdf

[12] COUNCIL DIRECTIVE (EU) 2017/1852 of 10 October 2017 on tax dispute resolution mechanisms in the European Union, *OJ*, 14 October 2017, L 265/1.

[13] C. Di Pietro, 'Tax Treaty Override and the Need for Coordination between Legal Systems: Safeguarding the Effectiveness of International Law', *World Tax Journal*, 2015, February 2015, p. 73.

explicitly defined in tax treaties[14] can be subject to the Customary International Law rules of interpretation of treaties.

The Customary International Law on the Interpretation of Treaties is a source of law that is recognized under the Statutes of the International Court of Justice[15] and are also recognized as Union law by the CJUE[16]. These rules have been updated in December 2018 by two resolutions of the General Assembly of the United Nations that were unanimously adopted by all countries[17].

The participant referrers to his contribution of November 2019 on the Unified Approach[18] for a development on how these resolutions may allow to grant taxing rights on digital activities under the existing treaty network.

68. When a digital activity occurs frequently enough in a territory it can be considered under an evolving interpretation as a fixed base under Article 5 in most tax treaties. Article 7 in most tax treaties can be interpreted through the criterion of wealth creation for determining the tax base in that jurisdiction.

Such evolving interpretation of Article 7 OECD MTC relates to the profit margin that can then be determined for 'profit that can be expected to be made' by a digital permanent establishment through the digital nature of its business:

- expected size of profits for the type of activity (ability-to-pay) (profitability through users),

- profits avoided through relocation (BEPS risks) (avoided tax costs) and,

- avoided sharing in various costs these non-resident enterprises trigger or risk triggering for the territory that resident enterprises and customers currently incur (benefit principle - avoided general budget costs – social costs). After all, avoiding proportionate sharing in increased costs of public services, that resident companies or customers in the market jurisdiction pay, is simply an indirect way of increasing the expected profit that can be made by doing business in that jurisdiction.

69. The threshold for allocated revenue under the Progress Report sets an amount of revenue that in the opinion of the participant is high enough to require a near constant form of digital activity that is frequently enough to qualify as a fixed base under the evolving interpretation

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[14] GARBARINO, C. Judicial Interpretation of tax treaties: The Use of the OECD Commentary. Cheltenham UK : Edward Elgar Publishing, 2016, p. 21 (I.63), zie ook inzake het OESO – modelverdrag (versie 2014) : Commentary on Art. 5 (1) § 5.1-5.4. : een zone die kan worden omschreven binnen dewelke de activiteiten plaatsvinden die als een commercieel en geografisch coherent geheel kunnen worden aanzien.

[15] Article 38, paragraph 1 (b) of the Statute of the International Court of Justice

[16] CJEU, Case C-386/08, 25 February 2010.

[17] UN General Assembly Resolutions of 20 December 2018, # 73/203 on *Identification of customary international law* and # 73/202 on *Subsequent agreements and subsequent practice in relation to the interpretation of treaties*, to be read for full understanding of its meaning with the Report of the INTERNATIONAL LAW COMMISSION, Chapter IV Yearbook 2018

[18] submission by Verhaeghe on November 12th 2019 to the OECD request for public input on Pillar I

rules of treaties. If Article 12 B 2021 UN MTC would also consider applying a mandatory and not optional minimum threshold for collected gross revenue in a market jurisdiction at a comparable level as in the Progress Report, the matter of Article 5 could be settled for all jurisdictions, regardless of being in or out the treaty-network.

For that purpose also the participant has suggested that both approaches under the Progress Report and the Article 12 B 2021 UN MTC abandon their fixed percentages of 25 % and 30 % that apply for all digital activities alike. Fixed percentages that vary per type of digital activity by taking in account the production factors and costs that allow to capture better the process of wealth creation in the market jurisdiction. The factors that relate to avoiding tax cost, profits and social costs are less relevant under that approach but can be considered under the definition of profit that can be expected to be obtained. Avoiding tax, costs for used facilities and services provided by the market jurisdiction and social costs all raise the net income and so the profit that can be expected to be made.

If the suggestion for variable margins is to be adopted under both the Progress Report and the Article 12 B 2021 UN MTC, there would be a case to defend both ways of taxation of digital activities under Article 7 in the treaty-networks.

70. Even when Pillar I under the Progress Report says to organize a separate way of taxation next to tax treaties, it will be transposed into national corporate income tax law. All national transpositions of the MLC must comply with the obligation of non-discrimination under the MTC's.

This obligation forms a direct link between the transposition of the MLC and provisions of tax treaties that apply on all national corporate income tax law that may give cause for legal mayhem.

Variable margins per type of digital activity are on principle compliant with the obligation of non-discrimination in corporate income tax between permanent establishments and resident enterprises for comparable activities as provided under Articles 24.3 OECD MTC[19] and UN MTC[20] and Article 23.2 US MTC[21]. These margins do not distinguish between resident and non-resident providers of the digital activity in the market jurisdiction.

71. GATS[22] and GATT[23] also require non-discrimination as a general rule. But income taxes are not considered under Article III.2 GATT, unlike taxes applying to the goods themselves as indirect taxes, and thus could be said to fall outside the scope of GATT when they do not give rise to discrimination under the more general obligations defined in that agreement.

As for GATS, footnote 6 under Article XIV (e) of that agreement explicitly states:

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[19] https://www.oecd.org/ctp/treaties/articles-model-tax-convention-2017.pdf
[20] https://www.un.org/esa/ffd/wp-content/uploads/2018/05/MDT_2017.pdf
[21] https://www.irs.gov/pub/irs-trty/model006.pdf
[22] General Agreement on Trade and Services, https://www.wto.org/english/docs_e/legal_e/26-gats.pdf
[23] General Agreement on Tariffs and Trade, https://www.wto.org/english/docs_e/legal_e/gatt47.pdf

(e) inconsistent with Article II, provided that the difference in treatment is the result of an agreement on the avoidance of double taxation ***or provisions on the avoidance of double taxation in any other international agreement or arrangement by which the Member is bound****."*

There will be breach under GATS if the criteria of direct taxation are deemed in fact to be arbitrary, unjustifiably discriminatory or disguised restrictions on trade in services.

72. When following the suggestions the participant proposed, remaining main issues for tax litigation purposes are the mandatory tax relief and the distribution of the profit among market jurisdictions that is obtained by fixed margins in the profitability ratio's per segment or overall activity under the 2021 UN MTC approach and the altered group profit under the Progress Report.

Both approaches may consider that the share of the profit that is to go to market jurisdictions that opted for neither approach or the other approach, is considered 0 and cannot be transferred to another market jurisdiction under that approach.

In the event the obligation to grant tax relief to the group under both approaches should entirely or partially fall under an approach on a jurisdiction that did not opt for that same approach, the participant points out that Amount 'A' will then only be due partially so the tax relief should be considerably less to bear by the remaining jurisdictions (counter and or workshop) that opted for that approach.

Under the 2021 UN MTC update, a problem of tax relief arises when the jurisdiction of the beneficial owner or the recipient did not opt for that same approach. It is unclear under the rationale provided for the 2O21 UN MTC approach how this issue could be settled by appointing other jurisdictions. Could there then be a shared proportional obligation to give tax relief for all jurisdictions that joined that approach and that effectively levied taxes on gross revenue collected by members of that group or that entity in their jurisdiction?

By submitting tax relief to anti-tax avoidance requirements some of these issues may be avoided, made less important or more proportionate to bear for the workshop jurisdictions by following 'the money trail' when it leads into their jurisdictions as well.

73. The whole purpose is the effective and fair taxation of 'above territories' created wealth through digital activities. The public consultation document on the Unified approach stated that the proposal must be acceptable to all members of the Inclusive Framework, small and large, developed and developing (§ 35) and allow simultaneous implementation by all jurisdictions, to ensure a level playing field (§40).

For that reason also, the suggestions the participant proposed for withholding taxes could be adopted under both approaches (see above section B.5 § 59) and variable margins can provide a minimum amount of tax that can be expected.

74. Timely implementation is a key issue since digitalisation of the economy has spread rapidly and still is growing, with multiple effects on national budgets:

- on the one hand:
    - loss of both corporate and personal income tax due to supplanted business models or substitution of human functions by algorithms,
    - loss of tax base from increased tax engineering through digital activities,
    - loss of social welfare contributions from substitution of human functions by algorithms or employees who become contractors that must in fact execute instructions of algorithms on a digital platform and have no other business,

- and on the other hand:
    - increased public welfare spending on newly unemployed workers whose functions have been taken over by algorithms or whose employer's business model was not adapted to digitalisation,
    - increased public spending to provide digital skills required in a digitalised economy to both the employed and unemployed,
    - pollution and intensive use of roads from increased traffic through personalised deliveries and returns,
    - and costs for organizing the telecommunication network and meeting the ever-increasing demand for electricity required by servers and various connectivity tools in the national territory for:
        - investing or stimulating investments in carbon neutral or renewable electricity production and storage in the national territory,
        - investing or stimulating investments in electricity distribution networks in the national territory that need to enable upstream and downstream storage of energy that is generated in peaks corresponding to the weather and sunlight under renewable energy production.

The crucial question remains of how much time it will still take to implement. The participant hopes that the input provided may be of use for shorting that time laps for the OECD's ongoing efforts.

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